

STATE OF MICHIGAN
COURT OF APPEALS

ALLIED PROPERTY & CASUALTY
INSURANCE COMPANY,

Plaintiff-Appellant,

v

PIONEER STATE MUTUAL INSURANCE
COMPANY,

Defendant-Appellee.

FOR PUBLICATION
October 17, 2006
9:10 a.m.

No. 259381
Roscommon Circuit Court
LC No. 02-723678-CZ

Official Reported Version

Before: Borrello, P.J., and Saad and Wilder, JJ.

WILDER, J. (*dissenting*).

I must respectfully dissent. I would not conclude, as does the majority, that MCL 500.3121(1) should be interpreted to preclude property protection insurance as a matter of law for any "fire related to auto repair at an auto-repair business." See *ante* at _____. Rather, I would conclude that the plain language of the statute would preclude coverage of an auto-repair-related fire at an auto-repair business *only* if the facts demonstrated that the repair and the related damage occurred "within the course of a business." The trial court's ruling that Anthony Fitzgerald conducted a business from his father's garage did not address the question whether the specific repair at issue occurred within the course of that business. Thus, I would find that the trial court erred in granting summary disposition in favor of Pioneer.

MCL 500.3121(1) states in relevant part:

Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation,

maintenance, or use of a motor vehicle as a motor vehicle However, accidental damage to tangible property does not include accidental damage to tangible property, other than the insured motor vehicle, that occurs *within the course of a business* of repairing, servicing, or otherwise maintaining motor vehicles. [Emphasis added.]

Thus, the focus of the statute as applied to this case is whether the damage occurred "*within the course of* [an auto-repair] business," and not, as posited by the majority, whether the damage occurred "*at* an auto-repair business."

In the instant case, Allied presented evidence that the automobile repair at issue was performed by Anthony Fitzgerald as a favor for Patricia Brauning, his former girlfriend and the mother of his child, and that the repair occurred in the garage of a private home rather than at a commercially zoned facility. In addition, contrary to the evidence that Mr. Fitzgerald regularly performed automobile repairs in his father's garage for an established clientele, Mr. Fitzgerald testified that at the time of the fire he only performed repairs in the garage on his own vehicle. Thus, even assuming for purposes of the summary disposition motion that Mr. Fitzgerald conducted an auto-repair business in his father's garage on an ongoing basis, the question still remains whether the evidence established that the specific repair at issue in this case, the repair of Ms. Brauning's vehicle, was done in a business context, i.e., "within the course of" Mr. Fitzgerald's auto-repair business, rather than in a residential context.

As our Supreme Court has noted, "residential and commercial or business uses of property are not mutually exclusive; an activity may be both residential in nature and commercial or business in nature." *Terrien v Zwit*, 467 Mich 56, 73; 648 NW2d 602 (2002). The record presented herein requires consideration of whether the context of the repair was a residential use

or a business use of the garage.¹ I would conclude that the evidence presented by Allied raises a genuine issue of material fact regarding whether the repair of Ms. Brauning's vehicle constituted a residential use of the property or a repair within the course of his business. Although the evidence that Mr. Fitzgerald did the repair work as a gratuity is unrebutted on the record, in reality whether Mr. Fitzgerald's assertion in this regard is credible is a jury question. *Brown v Mayor of Detroit*, 271 Mich App 692, 710; ___ NW2d ___ (2006), (stating that "if a party submits documentary evidence to support his or her position, the jury should decide issues of credibility.")

For the reasons stated, I would reverse and remand for further proceedings.

/s/ Kurtis T. Wilder

¹ For example, I would not think it would be in serious dispute that Mr. Fitzgerald's use of his father's garage to repair his own vehicle would be considered a residential use and not a use of the residential property in the course of his auto-repair business.